



April 9, 2001

Ms. Lisa Aguilar
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2000-1414

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145769.

The City of Corpus Christi (the “city”) received a request for thirteen documents relating to certain litigation. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal*

Found., 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You have provided this office with a copy of a petition in the case of *City of Corpus Christi v. Manhattan Construction Co.*, No. 94-6459-A, 22d Judicial District Court, Nueces County, Texas. Furthermore, you state that this litigation was pending at the time the city received the instant request for information. You also state that the litigation and the request for information relate to the same matter—the design and construction of the Corpus Christi City Hall building. Based on your arguments and our review of the information, we conclude that the requested information relates to pending litigation.

We note, however, that Exhibits 12 and 13 appear to have been seen by a third party, Madsen, Kneppers & Associates (“Madsen”). Section 552.007 of the Government Code prohibits a governmental body from selectively disclosing information that is not confidential by law but that a governmental body may withhold under a discretionary exception to public disclosure. However, disclosure of information to an individual or entity pursuant to civil discovery does not constitute selective disclosure for purposes of section 552.007. Open Records Decision No. 579 (1990). Therefore, if the city disclosed Exhibit 12 or 13 to Madsen outside the civil discovery context, none of the asserted exceptions applies to these exhibits, and you must release the exhibits. See Gov’t Code § 552.007.

We further note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Here, it appears that all of the requested information may have been provided to the opposing parties in the pending litigation. To the extent that any of the requested information has been seen by the opposing parties to the litigation, the information is not excepted from disclosure under section 552.103(a).¹ Finally, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

¹Similarly, the city waived any attorney-client or work product privilege with respect to information it voluntarily disclosed to the opposing parties. See Tex. R. Evid. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.--Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.--Houston [14th Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.--El Paso 1990, no writ); Open Records Decision No. 630 at 4 (1994).

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate ...

Gov't Code § 552.022(a)(1), (3), (5). Exhibits 3, 9, and 12 qualify as completed reports, audits, evaluations, or investigations made of, for, or by the city and are expressly public under section 552.022(a)(1). Exhibit 2 contains a contract relating to the expenditure of public funds by the city that is expressly public under section 552.022(a)(3). Finally, Exhibits 1, 6, 7, 8, and 13 consist of information used to estimate the need for or expenditure of public funds or taxes by the city. Exhibit 1 relates to a project for which the city has clearly completed its estimate. Therefore, Exhibit 1 is expressly public under section 552.022(a)(5). To the extent the city has completed its estimate for the projects to which Exhibits 6, 7, 8, and 13 relate, these exhibits are also made expressly public under section 552.022(a)(5). The documents made expressly public under section 552.022 must be released unless they are confidential under other law. Section 552.103 of the Government Code is a discretionary exception and is not "other law" for purposes of section 552.022.² Therefore, you may not withhold the contract in Exhibit 2 or Exhibits 1, 3, 9, and 12 under section 552.103. Furthermore, you may not withhold Exhibits 6, 7, 8, and 13 under section

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

552.103 to the extent the city has completed its estimates for the projects to which these exhibits relate. You may withhold the remainder of the information from disclosure under section 552.103 unless (1) the city has already disclosed the information to an individual or entity outside of the civil discovery context, or (2) the city has already disclosed the information to the opposing parties, through discovery or otherwise, in the pending litigation.

With respect to the exhibits made expressly public under section 552.022 of the Government Code, you raise section 552.107(1) of the Government Code, which excepts information protected by the attorney-client privilege. Like section 552.103, this exception is also discretionary and therefore is not "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994). Consequently, the information made expressly public under section 552.022 may not be withheld under section 552.107(1) of the Government Code.

Nonetheless, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in Exhibits 1, 2, 3, 6, 7, 8, 9, 12, and 13 is confidential under Rule 503.³

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

³We acknowledge that you raise the attorney-client privilege for Exhibits 4, 5, 10, and 11. You also raise the attorney work product privilege for Exhibits 10 and 11. As noted above, however, to the extent these exhibits are not excepted by section 552.103, they likewise cannot be withheld under the attorney-client and work product privileges. Thus, we need not address your attorney-client or work product privilege assertions with respect to these exhibits.

(D) between representatives of the client or between the client and a representative of the client; or

(D) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You indicate that the report in Exhibit 12 was prepared for the city’s attorney in anticipation of litigation. Upon reviewing the information, which was prepared by a consulting group, we agree that Exhibit 12 is protected by the attorney-client privilege to the extent it has not been voluntarily disclosed to a third party. See Tex. R. Evid. 511. On the other hand, you have not demonstrated, nor is it apparent, that any of the documents in Exhibits 1, 2, 3, 6, 7, 8, 9, and 13 consist of communications between privileged parties or reveal confidential communications. Therefore, you have not met your burden under the attorney-client privilege with respect to Exhibits 1, 2, 3, 6, 7, 8, 9, and 13. Consequently, you may withhold Exhibit 12 to the extent it has not been voluntarily disclosed to a third party. However, the city must release Exhibits 1, 2, 3, and 9. Furthermore, to the extent the city completed the estimates for the projects to which Exhibits 6, 7, 8, and 13 relate, you must also release these exhibits.

In summary, section 552.007 requires the city to release the information to the present requestor to the extent the city previously disclosed it to any person or entity outside the context of discovery in prior litigation. If the sole prior disclosure of the information was pursuant to discovery in prior litigation, section 552.007 does not apply. Information that is not subject to section 552.007 may be withheld under section 552.103 to the extent it has not been made available to the opposing parties in the pending litigation, and provided section 552.022 does not apply. Exhibits 1, 2, 3, and 9 are subject to section 552.022 and, because the attorney-client privilege has not been demonstrated to apply, these exhibits must be released to the requestor. Likewise, to the extent the city has completed the estimates

pertaining to the projects to which Exhibits 6, 7, 8, and 13 relate, these exhibits are also subject to section 552.022, are not excepted by the attorney-client privilege, and thus must also be released to the requestor. Exhibit 12 is confidential under Texas Rule of Evidence 503 and may be withheld from disclosure to the extent it has not been disclosed to a third party. As to the remaining information, Exhibits 4, 5, 10, and 11, this information may be withheld under section 552.103 to the extent section 552.007 does not apply and to the extent the information has not been made available to the opposing parties in the pending litigation.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

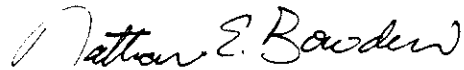
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, reading "Nathan E. Bowden". The signature is fluid and cursive, with the first name "Nathan" being more prominent.

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/

Ref: ID# 145769

Encl: Submitted documents

cc: Mr. Jeri L.S. Morey
711 North Carancahua, # 518
Corpus Christi, Texas 78475
(w/o enclosures)